

Decision to decline a character waiver and associated visa application

Legislation	Ombudsmen Act 1975, Immigration Act
Agency	Immigration New Zealand
Ombudsman	Chief Ombudsman Peter Boshier
Case number(s)	487627
Date	October 2019

Immigration New Zealand acted unreasonably in deciding not to grant a character waiver and in subsequently declining a visa application – relevant factors were not appropriately balanced and weighed – lack of attention to whether complainant’s circumstances were compelling enough to justify granting the character waiver required for the application to be approved – complainant given opportunity to apply again

Background

Immigration New Zealand (INZ) uses immigration instructions to make decisions about visa applications. Instruction A5.1 sets out that applicants for all visas must be of good character, and that an application may be declined if an applicant fails to meet the necessary character requirements and these requirements are not waived.

In 2018, the complainant required a character waiver in order to be granted a further work visa, due to a conviction after his arrival in New Zealand. In 2017, he had been granted a character waiver for a work visa as INZ considered his offending to be at the lower end of the spectrum, and the circumstances to be sufficiently compelling to justify waiving the good character requirement.

However, when the complainant applied for a character waiver relating to subsequent visa applications in 2018, INZ declined to waive the good character requirement.¹

In considering the seriousness of the offence—the same offence considered for the first application—the immigration officer concluded that *‘the incident is considered to be relatively serious given the nature of the offence’*. The complainant had appealed against the original conviction, and the immigration officers viewed this as a negative factor in their assessment.

Investigation

After granting the original character waiver in 2017, INZ added an alert against the complainant’s name in its Application Management System (AMS) records. The alert included comments from a Court of Appeal judgment concerning the decision to decline the complainant’s application for a discharge without conviction, and the sentence imposed.

The alert noted that the original judgment was appropriate; that the offending was more towards the moderate than the lower part of the spectrum; and that the complainant’s expression of remorse was found not to be genuine. It also included a comment about the victim’s vulnerability. It seemed to the Chief Ombudsman that the purpose of the alert was to guide future decision-making on the issue of character.

The Ombudsman accepted that INZ was not bound to grant a subsequent waiver in 2018 purely on the basis that one had been granted in 2017. He acknowledged that the outcome of a later waiver assessment might differ where there has been a change in circumstances, or where the original assessment was found to be flawed. However, he considered that the change would need to be significant, or at least explained in a way that made the basis for the different assessment clear.

In the Ombudsman’s view, significantly more weight was placed on the circumstances of the offending when the later application was declined, than when the earlier application had been approved. While he accepted that such a decision might possibly be made, he nevertheless expected to see clearly articulated reasons for the change in assessment. On the basis of the record of decision, he was not satisfied that all the relevant factors of the case had been appropriately balanced and weighed. He noted that it was unclear what weight the immigration officer had given to the fact that this was the complainant’s only offence, or to the time that had elapsed since the offence was committed.

The Ombudsman also noted that while the immigration officer had taken into account certain remedial steps taken by the complainant, such as the completion of appropriate community courses, they considered that *‘sufficient time had not lapsed... [to] indicate whether the applicant will put these techniques into practice’*. There was no indication in the decision-making record as to what the immigration officer considered might be *‘sufficient time’*; nor

¹ The complainant made two subsequent visa application in short succession of each other that were both subject to reconsiderations by INZ. The investigation focused on the final decision by INZ, made in February 2019.

were the complainant's remedial actions included as positive factors in the record. The Ombudsman considered this comment to be speculative, and unsupported by any objective information or persuasive cause for concern.

The Ombudsman was also concerned that the complainant's unsuccessful appeal against conviction had been included as a negative factor in the character waiver decision. In this regard, the immigration officer had considered that the dismissal of the complainant's appeal indicated that *'the incident was considered serious enough for a lasting slur on [his] character'*.

The Ombudsman considered that the immigration officer's comments about the potential lasting effect on the victim were speculative and a matter for the court to consider, noting that a victim impact statement had been provided to the court. The Ombudsman also noted that the purpose of the character waiver assessment was to consider whether the complainant's circumstances were compelling enough to justify making an exception to the character requirement – it was not to review and re-determine the circumstances of his offending.

The Ombudsman was not satisfied that the immigration officer had adequately balanced the positive and negative factors of the case, but had rather listed the overall factors, giving significant weight to the conviction. The conviction, and the circumstances of the offending, were disproportionately emphasised in the final waiver assessment.

In the interests of fairness and natural justice, the Ombudsman noted that INZ was obliged to give genuine consideration to whether the applicant's circumstances were sufficiently compelling to warrant a waiver. In order to be satisfied that the decision-making process had been undertaken in a fair and reasonable manner, the Chief Ombudsman expected to be able to understand, from a plain reading of the decision record, how the relevant factors had been weighed in reaching the decision. He was not satisfied, from the record, that the various factors had been appropriately balanced and weighed.

During the investigation, INZ commented that immigration officers do not generally have access to court judgments and make their decisions solely on the information to hand. The Ombudsman expressed caution about giving weight to select sentences from a judgment without obtaining a copy of the full judgment in order to understand the context of the findings.

Outcome

The Ombudsman formed the final opinion that INZ had acted unreasonably in declining the complainant's visa application based on the second character waiver assessment. He was not satisfied that INZ had either properly concluded that the first character waiver assessment was flawed and should not be relied on, or that the complainant's circumstances had changed since this first assessment was made. He was also not satisfied that INZ had conducted an appropriate balancing exercise of positive and negative factors.

After the Ombudsman conveyed his provisional opinion, INZ undertook to consider a new application from the complainant, with the fee waived. Given the remedy offered, the

Ombudsman saw no need to make a recommendation in relation to the complainant, but did recommend that the agency should reconsider the wording of the AMS alert regarding the appeal judgment. INZ accepted and implemented this recommendation.

INZ also published VisaPak guidance for staff about reliance on judicial decisions, and their inclusion in information warnings. Staff were advised that any future warnings should be limited to the outcome of any appeal, and that if they believed that the judgment would be helpful to other colleagues, then instructions on where to access the full judgment should be provided.

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